

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 4

2022

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Analysis of Consensus Mechanism in WTO with special reference to Developing Countries

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ABSTRACT

Consensus decision-making is prevalent in the WTO system's decision-making process. The analysis of the common consensus mechanism is the primary focus of this research article. The consensus norm represents the idea of national sovereignty, which is based on the idea that all countries are equal, regardless of their size, economic might, or political influence. However, it has some disadvantages, so it also makes an effort to highlight the implications of the consensus mechanism in the context of developing countries. As a result, suggestions are made for using consensus to make decisions while taking developing nations into account.

Keywords: *WTO, consensus, developing countries, sovereignty.*

I. INTRODUCTION

The focus of international law and institutions studies is changing from whether institutions matter to which features matter, how, and in what settings.² This contemporary focus advises that decision-making rules in international organisations be considered.

For most non-judicial actions, international organisations utilise one or a mixture of three types of decision-making rules: "majoritarian," (A majority vote of member nations is required to make decisions, and each member gets one vote.) "weighted voting" (Each state is allocated votes or other procedural rights in accordance to its population, financial commitment to the organisation, or other considerations, and decisions are made by a majority or supermajority.) or "sovereign equality." These organisations, which are based on a concept of sovereign equality of states derived from natural law theory and later adopted by positivists and others, formally negate status, provide equal representation and voting power in international organisations, and make decisions by consensus or unanimity of the members.

Decision-making procedures are one of the most essential aspects of an institution's operation that may be used to assess its legitimacy. Because they demonstrate how an organisation treats its constituents, they satisfy the first and most basic level of responsibility. At the WTO, there

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² Martin and Simmons 1998; Downs, Locke, and Barsboom 1998; Abbott et al. 2000; Goldstein and Martin 2000; and Koremenos, Lipson, and Snidal 2001.

is a long-standing practise and history of using consensus to reach decisions. This practice of makings decisions through consensus was handed over from its antecedent the General Agreement on Tariffs and Trade (GATT). This strong preference for consensus decision-making over voting is codified in Article IX:1 of the Marrakesh Agreement Establishing the World Trade Organization (Marrakesh Agreement)³, which states: "[t]he WTO shall maintain the practise of decision-making by consensus followed under GATT 1947."

While the Marrakesh Agreement explicitly recognises consensus as the preferable method of decision-making, it also expressly acknowledges the legitimacy of voting as a secondary method when agreement is not possible. Nonetheless, voting at the WTO is never done in practise. Instead, since the WTO's formation, members have closely resorted to consensus.

Consensus decision-making has grown popular in recent multilateral forums, particularly the WTO. And this distinguishes the WTO from other international agencies such as the International Monetary Fund (IMF) and the World Bank (WB), which make decisions based on weighted voting. However, there are benefits and drawbacks in such consensus mechanism. On the one hand, decision-making by consensus provides emerging nations with a voice equivalent to that of their developed counterparts, regardless of trade shares or economic size. On the other hand, developing nations confront several drawbacks as a result of consensus-based decision-making. Finally, several ideas for WTO decision-making reform are made in order to assist the WTO become the most transparent, efficient and legitimate institution for promoting international trade.

II. UNDERSTANDING WHAT CONSTITUTES CONSENSUS

The very notion of consensus might provide insight into whose interests it is supposed to reflect and/or compensate. There must be a precise definition of consensus in order to establish if it has been attained, particularly if judgments are to be legally enforceable by member states. Unlike other forms of decision-making, consensus mechanism can relate to both the process and the outcome. Process consensus is related to "active consensus," as defined by Buzan (1981). The procedure entails a negotiation style whose ultimate purpose is to achieve agreement among the negotiating parties. In UN Law of the Sea discussions, this negotiating strategy was adopted widely, albeit not without controversy. Likewise, outcome consensus examines if and how many member states oppose a proposed policy. As a consequence, the

³ Marrakesh Agreement Establishing the World Trade Organization, [World Trade Organisation Official website] <https://www.wto.org/english/docs_e/legal_e/04-wto.pdf> accessed 2nd August 2022.

outcome consensus can be used in place of a formal vote, Whereas, active consensus is a technique of negotiation aimed to attaining a widely agreed-upon conclusion.⁴

For the purposes of this article, in its truest sense, consensus would imply unanimous or strict consensus. To put this in context, no voting member should dissent or actively vote against a law if given the opportunity. In certain cases, organizations have defined a stringent definition, stating that in order to establish agreement, a proposal may not be explicitly rejected by any member. "While a divergent viewpoint hampers consensus, abstinence or quiet facilitates it". This is exactly what the WTO rules state: "no Member present at the meeting when the decision is taken, expressly opposes to the proposed decision," In contrast, a number of votes have been taken at the United Nations General Assembly in which there is no total contrast in the guise of a no vote, but an abstinence may be enough to force a shift from consensus to roll-call voting. If there is a formal appeal, the matter will be decided by a vote under the de jure selection method. In fact, though, given the organisation's infrequent voting, it is impossible to envisage a circumstance in which all 164 members would either agree or refrain from objecting. To put it more succinctly, the fact that voting is so infrequent in the WTO, given the vast spectrum of interest represented by its massive membership, is perplexing if absolute consensus is kept.

Formal and informal consensus

The specific consensus rule may help to define the notion more clearly. Formal consensus rules are those that provide for decision-making by consensus in the charters or rules of agreements of international organisations. The International Monetary Fund (IMF), the World Trade Organization (WTO), and the World Bank, for example, have formalised consensus norms in their charters or bylaws.

Informal consensus norms emerge as a result of practise. Despite the fact that the UN Charter does not define when a measure can be passed by agreement, most resolutions in the General Assembly are passed without a vote.

III. ORIGIN OF CONSENSUS

The General Agreement on Tariffs and Trade (GATT) is where the consensus approach of decision-making originated. Even when the GATT regulations required a formal vote, such as when granting exemptions, a consensus text would be developed beforehand through

⁴ Lockwood Payton, *Consensus Procedures in International Organisation*, European University Institute Working paper, MWP (2012)

negotiation and discussions before the official vote.⁵ It was exceedingly rare to employ voting at any point of the negotiating process. The US, for example, sought an unusual postal ballot in 1985 during the Uruguay Round's pre-launch phase. Two-thirds of the contracting parties voted in favour of calling a special session on services, according to the results of the poll.⁶ Even this pivotal vote, however, was not utilised in the real decision-making process to put services under the GATT's scope. Rather, talks and negotiations proceeded, eventually leading to the Punta del Este Declaration, which kicked off the Uruguay Round with its two-track negotiating approach on services.⁷ Another GATT custom aided consensus: "not to allow progress to be stymied by one party's denial, unless it happened to be one of the big trading nations."⁸

IV. IDEA OF CONSENSUS AS STIPULATED UNDER WTO AGREEMENT

Normal Consensus: Article IX:1 of the WTO Agreement lays forth the standard decision-making procedure for WTO bodies.⁹ If no Member present at the meeting when the decision is made expressly opposes to the proposed conclusion, a WTO body is regarded to have decided by consensus on an issue submitted for its consideration. To put that into perspective, unless a Member expressly disagrees to a proposed decision, it is made. Owing to disagreement, if consensus cannot be reached Article IX:1 of the WTO Agreement allows decision making by voting. Decisions are then made by a majority of the votes cast, as is common practice. However, like with the previous GATT, voting by WTO committees is extremely rare.

Special or reverse consensus in WTO:

According to Article 2.4 of the Dispute Settlement Understanding, if the DSB is required to make a decision, the conclusion is always reached by consensus. The consensus requirement is really a "reverse" or "negative" consensus requirement for most major decisions, such as the decision to constitute a panel, the approval of panel and Appellate Body recommendations, and the permission of suspension of concessions and other commitments. The "reverse" consensus

⁵ John Jackson, *The World Trading System: Law and Policy in International Economic Relations*, Cambridge MA: MIT Press (1997)

⁶ Michael Hart, *The GATT Uruguay Round, 1986-93: The Setting and the Players*, in Fen Osler Hampson, with Hart, *Multilateral Negotiations: Lessons from Arms Control, Trade and the Environment*, Baltimore, John Hopkins University Press, 1995

⁷ Amrita Narlikar, *Bargaining Together in Trade: Developing Countries in Coalitions*, Oxford University Press, (2000)

⁸ Hoekman, Bernard M. and M. M. Kostecki, *The Political Economy of the World Trading System: the WTO and Beyond*, Oxford University Press, 2nd Edn., (2001)

⁹ Article IX:1 "The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. [...] Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement."

criterion means that the DSB is presumed to make a decision unless WTO Members agree that it should not be made. Because minimum one Member will normally have a vested interest in the DSB establishing a panel, adopting the panel and/or Appellate Body reports, or authorising the suspension of concessions, it is highly improbable that there will be a consensus not to approve these judgments. As a result, for all intents and purposes, the DSB's decision-making on these issues is automated.

Even though consensus always triumphs in the WTO system's decision-making process, voting is occasionally used and there are certain circumstances, where voting is required specifically. They are enumerated below:

1. *Adoption of a ruling on the interpretation of WTO or international trade agreement provisions.*

Despite the fact that the legal consequence of an authoritative interpretation is not specified in Article IX:2 of the WTO Agreement, it is evident that such an interpretation would bind all Members.

2. *Waiver of a Member's roles and responsibilities provided in Article IX:3 WTO Agreement.*

3. *Article XXII:2 deals with accession. The agreement on the terms of entry must be approved by a two-thirds majority of WTO members at the Ministerial Conference.*

4. *Resolutions on amendments, in most situations, need a two-thirds majority of the members if they do not achieve an agreement within a certain time limit, which is usually 90 days (Article X WTO Agreement).*

5. *The General Council must adopt the regulations on finance and the yearly budget assessment by a two-thirds majority of the WTO Members.*

V. BENEFITS OF CONSENSUS MECHANISM IN WTO

Consensus mechanism of WTO has its own advantages. The consensus norm, it is emphasised, embodies the national sovereignty concept, which is founded on the 18th century state structure and the premise that all countries are equal, regardless of their size or economic or political might.¹⁰ The question of state sovereignty in the WTO appears to have been handled by the WTO's consensual decision-making process, in which each state that provides the WTO powers has given their approval.

¹⁰ P. van den Bossche and Iveta Alexovi ová, *Effective Global Economic Governance by the World Trade Organization*, Journal of International Economic Law, Oxford University Press (2005)

1. As WTO Director-General Mike Moore remarked immediately after the Ministerial Conference's disastrous failure in Seattle in 1999, consensus decision-making is a "basic democratic foundation."¹¹ Those approved by consensus invariably have more "democratic legitimacy" than those decided by vote. It's probable that WTO members enjoy a variety of perks. That is why they are interested in forming organisations with shared aims and attempting to promote their own interests by enacting laws and regulations. As a result, the decisions made may not represent mutual advantages but just benefit those who support them. Consensus decision-making, on the other hand, carries no such consequence. Consensus entails granting each member a veto, which is in line with the idea of equal sovereignty of states, thereby the decisions are more legitimate.

2. Weak and disadvantaged WTO Members have less impact in the decision-making process when decisions are reached by consensus. Because even the weaker and poorer WTO members can stop judgments from being adopted, other powerful members must endeavour to persuade them of the decisions' substantial features. Consensus decision - making process clearly provides members of WTO with a "sharp weapon" which they would not otherwise have. In this way, the decision will reflect the various Members' stakes in the subject, as well as their clout.¹² As a result, it's reasonable that members of WTO are opposed to changing the present decision-making process through consensus.

3. Consensus decision-making is required to guarantee that only those decisions are approved that have a good possibility of being implemented. If actions are controversial, they are likely to meet significant pushback from members. Unpopular choices may become laws if they are made by voting, which is accompanied by strong support from influential WTO members and economic or political pressure on other members. In addition, execution is always a challenge. Decisions that are irreconcilable with a Member state's commercial and financial interests are unlikely to be implemented. As a result, the purpose of guaranteeing mutual benefit amongst WTO Members, as stated in the WTO Agreement, is jeopardised. It is self-evident that failing to apply judgments to members who were opposed to their adoption will result in disintegration of the WTO system, diminishing its effectiveness. Consensus is based on a deeper and often more powerful foundation. Because the hunt for agreement frequently entails the search for a workable compromise which is somehow agreeable to everybody, this is likely to have an impact on the quality.

¹¹ T. Buck, *EU May Re-Think Multilateral Trade Role*, Financial Times, 16 September 2003.

¹² T. Cottier and T. Satoko, *The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response*, Aussen wirtschaft Publisher (2003)

4. The use of decision-making through consensus assures that the regulations of the WTO and its policies do not venture beyond the realms of economic and political realities. Since developing WTO nations account for 70% of the WTO membership, it appears that they will triumph on every matter put to a vote. However, it is important to remember that developing nations contribute for just 30% of global commerce. The developed world is responsible for the remaining 70%. As a result, if decisions are made by clear majority on a one-country/one-vote basis, developed nations may be pushed out of the WTO because they are unhappy with the power balance, rendering the system ineffectual as a platform for global trade liberalisation. Consensus decision-making, but at the other hand, is free of such dangers. In fact, the majority of WTO members prefer consensus.

VI. OPERATING CONSENSUS MECHANISM IN THE WTO: GREEN ROOM

The initial goal of the Green Room approach was to improve negotiation efficacy by restricting the multitude of negotiating teams to those who could assist in moving the negotiating process forward. Because of the large number of members in WTO (164), effective bargaining in an open-ended plenary session engaging the whole membership is difficult. The Green-Room procedure earned its name since the conference took held in a room with green walls. Despite the fact that the room is no longer green, the moniker is still widely used. The GATT Director General was in charge of the Green Room procedure, which included deciding who would be included and keeping the list of invitees discreet.¹³ The majority of the data was not available to the general public, resulting in internal clarity in the decision-making process. Following the Seattle Ministerial, various initiatives have been done to overcome issues of internal decision-making transparency. First, a guest list is compiled and informed. Members are usually invited because of their active engagement, intellectual participation, and keen interest. While the Chairman chooses the prospective invitees, members who weren't on the list but think they have a significant interest in the subject are welcome to attend. Furthermore, minutes from at least some of the casual meetings are sent to the whole membership. During the Uruguay Round, the Green Room process functioned effectively; but, with more active players representing a wider range of themes and aims, the WTO decision-making process has become more difficult.

VII. INFORMAL CONSULTATION MEETINGS IN WTO

As previously said, while consensus purports to be a transparent and accountable decision-making process on paper, in practise it allows for non-transparency and informal mechanisms.

¹³ Peter Sutherland, *The World Trade Organization at Ten Years*, 4 World Trade Review 341, (2005)

Apart from the well-known Green Room informal consultation gathering, other forms of informal consultation such as hallway harassing, threatening, and enticements are common occurrence. Obviously, it allows a great deal of flexibility, but it's really for those who can use negotiating or agreements to their advantage, which typically implies to more economically advanced country. In addition to that, there is no way for a Member to participate in the decision-making process later on. As a result, the WTO's consensus relies on the unbalanced connection that exists between affluent and poorer country.¹⁴

VIII. DRAWBACKS OF CONSENSUS MECHANISM IN THE LIGHT OF DEVELOPING COUNTRIES

1. In the pretext of attaining multilateral consensus in WTO meetings, certain wealthy nations have frequently utilised the objective of consensus to conduct small group negotiations or informal consultations that exclude many poor countries and then exert bilateral pressure on them outside the WTO platform. Numerous developing nation representatives stated that consensus amounts to the dominant interests at the WTO outgunning lesser powers.¹⁵ As a result of being shut out of WTO decision-making, developing nations are seeking to be heard. Many issues exist in the Green Room process, according to developing country perspectives. To begin with, many developing nations have yet to achieve the stage of interest identification necessary to adopt a self-selection method and secure the chance to access and attend. Furthermore, because of the absence of norms and the informality of the process, it is essentially a consultation and debate process that occurs within secrecy. Those with the most power will bear the most influence as a result of this process. There are just a few nations that would question a judgment that has been presented as final.

2. The difficulty with the decision-making through consensus is that it takes place in an open forum. If a nation wishes to decline a proposed bill, it must do so in front of all other attendees. Many poor nations point out that people are frequently afraid of the implications of openly expressing their disapproval, therefore they choose for the safer choice of being silent.¹⁶ Many delegations claim that these tactics are frequently utilised even before the talks to make sure that dissenting nations exhibit restraint. Because the absence of dissent is regarded as consensus, poor nations are forced to make judgments with which they disagree. As a result,

¹⁴ P. Van Den Bossche, *Radical Overhaul or Pragmatic Change? The Need and Scope for Reform of Decision Making in the World Trade Organization* (2006, 12)

¹⁵ WTO, Internal Transparency and the Effective Participation of all Members, Main Points raised by Delegations (2000) < https://www.wto.org/english/news_e/news00_e/gcinternaltrans_e.htm> accessed 2 August 2022

¹⁶ Amrita Narlikar, *WTO decision-making and developing countries, Trade-Related Agenda, Development and Equity*, South Centre Working Paper No 11 (2001)

it's unclear if the system qualifies as a democratic because member states are reluctant to share their discontent. Active consensus and passive consensus are the two types of consensus. It's important to distinguish between these. Members can engage in a real consultative and bargaining process by expressing their opinions, resistance, and concerns about various aspects of the negotiation, and agreement can result from such a dialogue; nevertheless, passive consensus can result simply from members being silent. A passive consensus's long-term viability is likewise questioned. Even if no nations formally disagree to an agreement on writing, its real execution will be problematic if the members themselves have some crucial objections to it, or they believe the accords have flaws.¹⁷

3. The Secretariat also does not give appropriate help to underdeveloped nations, which is another problem. At least some of the challenges above stated may be mitigated if members got enough help from the WTO Secretariat, allowing them to participate in decision-making through consensus with the knowledge that comes with it. Knowledge and research may not be enough to surmount political games and bilateral constraints that prevent poor nations from participating in consensus decision-making. They can, however, prove to be a significant strength by offering a forum for even weak nations to express concerns and alternative suggestions. The WTO's member-driven character, on the other hand, throws the burden of preparation and study on the members themselves in order for them to participate effectively and actively in consensus-based decision-making procedures. Many poor nations are unable to meet this obligation, and as a result, their membership in the WTO is hampered.

IX. CONCLUSION

The WTO system's decision-making process is dominated by consensus decision-making. Because consensus-based decisions have a long legacy, it is probable that they will continue to be in effect in the coming years. Invariably, they offer several theoretical benefits. They also expose you to potential dangers and drawbacks. In the procedural context, WTO decision-making standards based on sovereign equality of nations constitute organised deception. The consensus decision-making mechanisms of the WTO have permitted conformity to both the pragmatic reality of lopsided power and the rationale of sovereign equality's suitability. Although trade rounds are initiated through law-based negotiating, major powers have dominated strategic planning and rounds have been ended in the shadow of power—to varied degrees. WTO sovereign equality decision-making criteria may be used with invisible weighing

¹⁷ Blackhurst and others, *Improving African Participation in the WTO*, Working Paper commissioned by the World Bank for a Conference at the WTO, (1999)

to generate an unequal distribution of trade round results, rather than establishing a pattern of Pareto-improving outcomes judged equitable by all nations.

Institutions must adapt and change in response to changing conditions. Obviously, the WTO is no exception. As a result, if the WTO refuses to keep up with global trends and progress as an organization, "some of the WTO's key users may begin to look for solutions elsewhere". As a result, it is necessary to look for methods to reform the WTO and its decision-making process.

Reform will go a long way toward increasing developing nations' involvement in both the mechanism and the quality of decision-making. They're also crucial for long-term viability. Unless developing nations' legitimate suggestions to contribute in WTO decision making are treated seriously, the multilateral trade system overseen by the WTO is in jeopardy of losing its confidence and credibility among its members.

X. RECOMMENDATIONS

- Negotiation pressure should not be applied to underdeveloped countries on economic or political grounds. They must not be forced to support their viewpoints by industrialised countries, which can equate to intimidation and manipulation. They should not be reliant on trade privileges, bilateral assistance, or military aid from global financial organisations to persuade them to agree.
- Agreements should not be undertaken until all members have completed their technical training. More precisely, decisions and agreements should not be adopted unless and until all Members states, particularly developing nations, have a thorough understanding of the issues and their ramifications for their economies and cultures.
- The removal of the consensus system will result in a member state's sovereignty being revoked. As a result, despite maintaining the "consensus" paradigm, it is necessary to provide greater clarity to this process so that it is not mistaken for majority decision. As stated by an ex-Appellate Body member, this will avoid the death of the WTO and its affiliated bodies due to asphyxiation, and grasp "consensus" as a means of reconciliation.

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